examination of CommerceNet, however, reveals its "unfriendliness" for small and minority-owned businesses. As a system designed for and by large manufactures and small business that are already technologically literate it contains numerous financial and technical barriers to open access. Its annual membership fees and monthly costs cannot be justified for most small businesses. Given that small business, including the vast majority of minority businesses, annually account for over 70 percent of America's new jobs, the Office of Communication urges the Administration to reduce barriers to market entry rather than funding projects that erect them.

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Before the
NATIONAL TELECOMMUNICATIONS & INFORMATION ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE
Washington, D.C.

In the Matter of:	)	
	)	
A Notice of Inquiry Concerning	)	**Docket No. 940955-4255**
Universal Service and Open	)	
Access	)	

COMMENTS OF THE OFFICE OF COMMUNICATION
OF THE
UNITED CHURCH OF CHRIST

I. INTRODUCTION

The Office of Communication of the United Church of Christ ("OC/UCC") respectfully submits Comments in response to the National Telecommunications and Information Administration's ("NTIA") above captioned Notice of Inquiry, released, September 19, 1994, ("NOI").

OC/UCC has participated in Federal Communication Commission ("FCC" or "Commission") and NTIA proceedings on numerous occasions on behalf of the public interest. In 1990, OC\UCC submitted Comments in response to NTIA's Notice of Inquiry Concerning A Comprehensive Study of the Domestic Telecommunications infrastructure.[1] Most pertinent to the present proceeding OC\UCC advocated in favor of lifeline and linkup

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[1]. Comments of the Office of Communications, April 9, 1990, NTIA Docket No, 91296-9296.

services in conjunction with POTs service in 1986.[2] Then, as now, OC/UCC is primarily concerned about the impact that telecommunications will have upon members of society traditionally disenfranchised from the electronic media - the poor, the elderly, the disabled, and minorities.[3]

II. ELECTRONIC REDLINING IS A MARKETPLACE REALITY THAT CAN ONLY BE PREVENTED BY A RIGOROUSLY ENFORCED EFFECTS TEST SAFEGUARD.

> *We cannot tolerate - nor in the long run can this nation afford - a society in which some children become fully educated and others do not; in which some adults have access to training and lifetime education, and others do not.... Nor can we permit geographic location to determine whether the information highway passes by your door.*

Vice President Gore, *The Wall Street Journal*, January 14, 1994, at A14.

Despite the wise counsel of the Vice President and the efforts of others[4] to promote universal access to the Information Superhighway, Congress has failed to safeguard the American public from electronic redlining. As fully discussed below, electronic redlining is a mere extension of the market research and test marketing practices of the Regional Bell Operating Companies.

These comments are prompted by the need for the 104th Congress to

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[2]. Comments of United Church of Christ Office of Communication, August 28, 1986, CC Docket no. 78-72 & 80-286. In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72; Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286.

[3]. OC/UCC fully endorses the separately filed comments of the Center for Media Education et al in response to this NOI.

[4]. Raymond Lawton, Associate Director of the National Regulatory Research Institute correctly pointed out in his testimony at the NTIA Indianapolis field hearing that "in an unregulated market, services are provided to rural/residential/ low income service recipients last because service to them is often more expensive and they are most often unable to pay." NOI, note 18.

undertake aggressive steps to prevent electronic redlining.[5] At minimum anti-redlining legislation should contain a disclosure requirement and an effects test. Precedent for such safeguards can be found in the areas of employment, home mortgage loans, and consumer credit.

The following will provide an overview of instances of redlining practices as well as legislative remedies that can withstand judicial scrutiny.

A. ELECTRONIC REDLINING IS A REALITY OF THE UNREGULATED MARKETPLACE.

In the unregulated market competitors seek out those consumers who are expected to provide the best return on investment. This principle is reflected in the following words of the Chairman of Bell Atlantic,

> *[W]e will go to the areas that have the highest chance of being economically successful, and if they are successful, we will move forward.*

Raymond W. Smith. Chairman, Bell Atlantic, *The Washington Post*, December 19, 1993.

Except when required by law to conform to universal service standards the telephone industry is led by its own market research to seek out the most "profitable" consumer in the initial roll out of advanced communication services. Below is a discussion of market

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[5]. OC/UCC submits that following provision adopted by the Senate Commerce Committee of the 103rd Congress poses the insurmountable hurdle of requiring proof of intentional discrimination. Secondly, a carrier can circumvent the provision by proposing to serve all consumers, but deferring service to less affluent neighborhoods until last.

> Nondiscriminatory Access - In considering any application under section 214, the Commission shall ensure that access to such applicant's telecommunications service is not denied to any group of potential subscribers because of their race, gender, national origin, income, age, or residence in a rural or high-cost area.

Senate Bill S. 1822, 103rd Congress.

research, test marketing and deployment practices that supports this contention.

1. RBOCs RELY UPON MARKET RESEARCH THAT SAYS THAT HIGH-INCOME HOUSEHOLDS ARE THEIR BEST CUSTOMERS.

Over the years, the RBOCs have come to believe that households with the greatest disposable income are the most receptive and reliable customers for advanced communication services. Even when confronted with evidence to the contrary, this rule of thumb significantly influences marketing strategy.

In 1985, the Yankee Group first released a study entitled the Technological Advanced Family.[6] As a market research consultant for the seven RBOCs, the Yankee Group continues to update this study on an annual basis.[7] The study is designed to segment U.S. households on the basis of their inclination to adopt technology-based products and services.

Households reported to be most receptive to and to be early adopters of technology are classified as Technological Advanced Families (TAFs). These households, according to the study, constitute 15.7 percent of U.S. households.[8] Near-TAF households which are less interested in technology than TAFs, but display more receptivity than the mass market constitute 28.7 percent. The mass market - 55.6 percent - are referred to as Non-TAFs. Non-TAFs are reported to be the least

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[6]. The Technological Advanced Family, The Yankee Group, Boston, MA., 1985.

[7]. See Exhibit I for an analysis of TAFs according to RBOC region.

[8]. All figures are from the 1990 edition of the TAF report.

receptive and generally wait for prices to drop before making a purchase.[9]

An analysis of TAF demographics shows that the mean annual income of TAFs is $58,800 (see Exhibit II for other household characteristics).[10] According to The Yankee Group,

> the higher income of TAFs is a significant contributing factor in their higher levels of adoption of high-technology products and services. With substantially higher income than average, TAFs generally have more "disposable" income for purchasing high-tech products.[11]

This conclusion is consistent with the notion that RBOCs rely upon disposable income as the guiding rule of thumb for their marketing strategy.

Recent studies undertaken by the RBOCs show that racial minorities at all income brackets out-spend non-minorities on communication services (e.g., long distance telephone and cable TV service).[12] Indeed, some companies say that minorities comprise their best custom calling service customers.[13]

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[9]. id. at 1.

[10]. Other TAF profile characteristics include: mean home value - $118,300; 4 year college education - 39.2 percent; home owners - 80.8 percent; home-based business - 28.8 percent.

[11]. id. at 14. The report also states that, "The higher levels of technological awareness of this group of consumers, coupled with their greater financial capacity to purchase high-technology products and services for their households, have led them to regularly be among the first consumers to adopt many new products and services in the early stages of their introduction. Id. at 1.

[12] Spending and Saving on Communications Services by Minorities, PNR & Associates, Inc. April 1994.

[13]. Affordability Study: Ethnic Overview of Findings, Field Research Corporation, 1993, prepared for Pacific Bell.

Despite facts that confirm the existence of market demand for advanced communication services among minority and low-income customers, RBOC test marketing and deployment plans are designed to capitalize upon the high-income customer.

2. TEST MARKETING FOLLOWS THE PATTERN OF REDLINING NON-AFFLUENT COMMUNITIES.

The test marketing of video dialtone reflects a continuation of the pattern of pursuing affluent consumers. OC/UCC has examined the demographics of each of the communities[14] in which video dialtone has been test marketed. Of the 10 market trials examined, only the characteristics of Omaha, Nebraska in US West's region and Chamblee, Georgia in BellSouth's region, resemble the household income and racial composition of consumers statewide. Littleton, Colorado, also in US West's region, approximates the income, but not the racial composition, of Colorado.

Exhibits IIIa - IIIj contain an analysis of video dialtone market trials conducted by Bell Atlantic, (Montgomery County, Md; Falls Church, Va.) Southwestern Bell (Richardson, Tex.), NYNEX (three apartment high-rises in Upper East Side Manhattan), and GTE (Cerritos, Cal.).[15] Consumers in these communities represent an anomaly compared to statewide income and racial demographics.

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[14]. In some instances the test trial took place in small neighborhoods within the examined cities and counties. Because it was impossible to determine the exact boundaries of these neighborhoods, census tract data for the entire city or county was used for this analysis. In the case of NYNEX, census block data for the addresses of the high-rise apartment buildings in Manhattan were used.

[15]. Market trials for video dialtone were not conducted by Ameritech or Pacific Telesis.

The median household income for NYNEX's test trial was $46,461, $52860, and $37,725 at the three respective high-rises. The median family incomes for the same apartments were $67,002, $83,068, and $42, 829. The racial composition was substantially less than the state average in all but one high-rise complex.

Bell Atlantic's Maryland test trial focused on consumers with a median household income of $54,809. The percent of minorities in Montgomery County is 11.6 percent compared to 25.9 percent throughout all of Maryland. Consumers test trialed in Falls Church, Virginia have a median household income of $51,011 and are 7.5 percent minority compared to $33,328 and 19.8 percent for statewide data.

Richardson, Texas in Southwestern Bell's region has a median household income of $50,240 compared to $27,016 statewide. The percentage of minorities in Richardson is 10.7 versus 20.6 percent for the state of Texas.

In Cerritos California, GTE selected a site that has a median income of $59,076 compared to $35,798 for the state of California. Cerritos is comprised of a high percentage of Asian-Americans (39 percent). The percent of minorities, therefore, far exceeds the state average.

Test marketing, in most instances, is being conducted in communities where there is a preponderance of families that fit the TAF profile described earlier. As the TAF market represents approximately 16 percent of American households, one can conclude that only a narrow and very affluent segment of the American population will be the first to receive the social and economic benefits of the Information

and very affluent segment of the American population will be the first to receive the social and economic benefits of the Information Superhighway.

3. THE DEPLOYMENT OF VIDEO DIALTONE IS THE MOST EGREGIOUS EXAMPLE OF ELECTRONIC REDLINING.

Video dialtone (VDT) is expected to be one of the major backbones of the Information Superhighway. Consisting of over 400 channels of two-way interactive, video, audio and digital services, VDT will greatly revolutionize the information marketplace. Communities that are the first to receive the service will have the advantage of being early recipients of a host of educational, medical, research and commercial services.

In May 1994, five public interest advocates filed a joint petition[17] with the Federal Communication Commission claiming that the VDT deployment plans of four RBOCs[18] systematically excluded low-income and minority neighborhoods. The complaint was based upon an analysis of the Section 214 applications filed with the Commission by the companies. Concerning the promise that VDT will offer competition for cable TV, the Petition for Relief stated that,

> under [the] proposed plans, low income and/or minority areas will be among the last to benefit, if they do at all, from such competition....Vague promises of some future expansion

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[17]. Petition for Relief of the Center for Media Education, Consumer Federation of America, the Office of Communication of the United Church of Christ, the NAACP, and the National Council of La Raza, May 23, 1994, ("Petition"), In the Matter of Petition for Relief from Unjust and Unreasonable Discrimination in the Deployment of Video Dialtone Facilities, DA 94-621.

[18]. The Petition specifically raised concerns about the deployment plans of Ameritech, Bell Atlantic, Pacific Telesis, and US West.

are insufficient to achieve the positive effect of diverse programming.[19]

Attached to these Comments are the demographic analyses that accompanied the Petition (Exhibit IV). A graphical analysis of the 28 municipalities that Ameritech proposes to serve in Illinois shows that over 90 percent of them significantly exceed the median household income of the state. Three municipalities have incomes in the $60,000 to $65,000 range, 13 in the $45,000 to $60,000 range, and 10 in the $32.300 to $45,000 range.

Racial minorities account for less than the state average in 22 of the 28 municipalities - 0 percent to 5 percent in 8 communities, and 5 percent to 20 percent in 14 communities. In many instances the proposed deployment area exactly borders communities with high concentrations of low-income and/or minority people (see map).

In response to the Petition some of the RBOCs[20] stated that by the time VDT is fully deployed they will offer service to many of the households initially excluded. However, this response fails to address the concern that minorities and low-income people will be the last to receive the social and economic benefits of the Information Superhighway. The jobs, business opportunities, and informational programming associated with this new infrastructure will serve to enhance affluent communities where the quality of life already exceeds that of the communities excluded.

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[19]. Petition at 12 (emphasis added).

[20]. Less than thirty days after the Petition was filed, Bell Atlantic amended its proposal to include two areas that are predominantly minority and/or low-income - Washington, D.C. and Prince Georges County, Maryland.

The Petition recognized that it is impossible to deploy service universally from the very beginning. It therefore recommended that representative numbers of minority and low-income communities be included in each stage of deployment. If the deployment plans are redrawn to include people in proportion to their representation in the service area, minorities and low-income people will not be disparately impacted.

B. PUBLIC POLICY MUST ADOPT AN "EFFECTS TEST" TO PROTECT THE PUBLIC FROM ELECTRONIC REDLINING.

In the past, Congress and the courts have employed an "effects test" to prevent business practices that have a discriminatory impact upon a class of people even though the intent of the company is neutral on its face. The underlying premise of the "effects test" in federal statutes covering employment, housing, and consumer credit, is that discriminatory results can be *separated* from intent.

> [P]ractices, procedures, or tests neutral on their face, and even neutral in terms of intent cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[21]

In an era in which advances in telecommunications are increasingly influencing the social well-being of neighborhoods throughout the United States, it is imperative that public policy ensure equality in the deployment of service as well as service quality and cost. Proven models for preventing discrimination - where intent is irrelevant - can be found in the field of home loan mortgages, employment, and other areas that have experienced discrimination.

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[21]. Griggs v. Duke Power Co., 401 U.S. 424, (1971) ("Griggs") at 431 (concerning impermissible employment practices under the 1964 Civil Rights Act).

1. PRECEDENT FOR AN "EFFECTS TEST" CAN BE FOUND IN THE FIELD OF EMPLOYMENT.

The U.S. Supreme Court 1971 decision in Griggs v. Duke Power Co. relied upon Title VII of the 1964 Civil Rights Act to apply an "effects test" in a landmark case involving employment discrimination. The Court held that,

> ...good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.[22]

The operative words in the Civil Rights statute were business practices "designed, intended, *or used* to discriminate because of race." Id. at 433, (emphasis in original).

Many of the progressive holdings of the Griggs decision were subsequently overturned.[23] However, the 1991 Civil Rights Act expressed the clear intent of Congress to restore the Griggs standards in the field of employment.

A clear statutory "effects test" is needed in the field of telecommunications in order to safeguard against electronic redlining. Due to the leanings of the Court as evidenced by Wards Cove, the absence

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[22]. Griggs at 432.

[23]. In a 1989 split decision, Griggs was overturned by Wards Cove Packing Co. Inc. v. Antonio, 490 U.S. 662 (1989) ("Wards Cove"). The Court placed the burden upon plaintiffs to prove lack of justification for a discriminatory practice in addition to presenting evidence of discriminatory impact. Wards Cove also held that a challenged business practice may stand, if in some *significant way* it serves a legitimate business need. The overruled standard of Griggs required a discriminatory practice to be *necessary* or *essential* to avoid being struck down. Griggs at 431.

The Griggs standard was restored by the express intent of Congress in the 1991 Civil Rights Act. Civil Rights Act of 1991, 42 U.S.C. § 2000e.

of a statutory "effects test" will likely present aggrieved citizens with the prohibitively burdensome task of uncovering "smoking gun" evidence of intentional discrimination. The burden of proving non-intentional discrimination would be equally difficult because of the ruling of the Court's reversal of portions of the Griggs decision.[24]

2. THE DISCLOSURE REQUIREMENTS OF HOME MORTGAGE STATUTES HAVE EMPOWERED COMMUNITIES AGAINST REDLINING.

In 1975, Congress enacted the Home Mortgage Disclosure Act[25] in order to prevent home mortgage lenders from redlining and causing the economic decline of communities with high concentrations of racial minorities and/or low-income people.[26] The public obligation of banks and other lending institutions to serve their local communities in a non-discriminatory manner is premised upon the extensive government backing received by such institutions (ie. federal deposit insurance, and access to Federal Reserve System's lender of last resort facility), as well as the duty of lenders under the Community Reinvestment Act[27] to help meet the credit needs of the lender's *entire* community, including low and moderate income areas.[28]

The public disclosure provisions of HMDA enable regulators and the

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[24]. id.

[25]. Home Mortgage Disclosure Act of 1975, 12 U.S.C. § 2801 ("HMDA").

[26]. For evidence of discriminatory lending practices 15 years after the passage on HMDA, see *Discrimination in Home Mortgage Lending: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, 101st Cong., 1st Sess. 7 (1989).

[27]. Community Reinvestment Act of 1977, 12 U.S.C. § 2901 ("CRA").

[28]. Regulation BB Community Reinvestment, 12 CFR 228, 228.2

general public to make an objective determination about compliance with anti-redlining safeguards. Lending institutions must report the number and amount of mortgage loans approved and applied for according to census tract, race, gender, and the income of the applicant.[29]

Because of the HMDA disclosure requirements and the rating standards of CRA,[30] consumer advocates and federal officials are in a position to review the community reinvestment ratings of lenders seeking to obtain approval for a branch opening or merger or acquisition with another lender. The statistical information required by HMDA has empowered communities to successfully negotiate over $7.5 billion worth of community reinvestment as a result of expansion challenges.

In addition, lenders have unilaterally committed $23 billion towards community development while expansion requests have been pending before regulatory agencies.[31]

> Thus, the CRA is credited with resulting in total commitments in excess of $30 billion to poor communities throughout the country, far exceeding whatever conditions would have been imposed by regulators.[32]

To date there are no major court cases that have interpreted the

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[29]. HMDA national home purchase loan statistics for 1993 show that 34% of African-American applicants were rejected compared to 25.2% for Hispanics, 15.4% for Whites and 14.5% for Asian-Americans.

[30]. Based upon community reinvestment performance, regulators rate lenders in one of the following categories: "outstanding", "satisfactory", "needs improvement", and "substantial non-compliance".

[31]. Fishbein, Allen J., *The Community Reinvestment Act After Fifteen Years: It Works, But Strengthened Federal Enforcement is Needed*, Fordham Urban Law Journal, vol. 20 No. 2. 1993, ("Fishbein") at 298.

[32]. id.

"effects test" in the mortgage lending field. However, the disclosure provisions of HMDA have facilitated the prevention of redlining by means of objective measures of disparate impacts.[33]

Employment, housing, and consumer credit are but a few examples of application of the "effects test". Although use of the "effects test" began with scrutinizing employment discrimination, there is no reason to restrict its use to that area. Many would argue that the "effects test" should become the generally accepted standard for testing discrimination.[34]

3. AN "EFFECTS TEST" CAN EFFECTIVELY PROTECT CONSUMERS FROM ELECTRONIC REDLINING.

Well established precedents for the "effects test" exist in other fields and provide an excellent model for anti-redlining safeguards in the area of telecommunications.[35] An effective anti-redlining safeguard must consist of two components: a disclosure requirement (comparable to HMDA) and provisions setting forth burdens of persuasion (applying the law under Griggs).

Persuasive proof should consist of a three-step process: 1) Has the complainant established that a prima facie case for discrimination

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[33]. For a discussion of the critical utility of HMDA disclosures in establishing patterns of redlining see *Testimony of the Center for Community Change* before the U.S. Senate Committee of Banking, Housing, and Urban Affairs, February 24, 1993, at 4.

[34]. Hsia, *The Effects Test: New Directions*, 17 Santa Clara L. Rev. 777 (1977).

[35]. See Colton, Roger D., *Discrimination as a Sword for the Poor: Use of an Affects Test in Public Utility Litigation*, Journal of Urban and Contemporary Law, vol 37, 1990 ("Colton").

exists? Yes, if a business practice has an unreasonable disparate impact upon a class of subscribers; 2) Has the defending party justified the business practice? Yes, if the practice is necessary or essential to accomplishing a legitimate business objective; and 3) Has the complainant offered a rebuttal that shows the availability of an alternative business practice that is less discriminatory? Yes, if the alternative can accomplish the same legitimate business end. In sum, a business practice that has a disproportionate disparate impact upon a protected class would be allowed to stand, only if the practice is necessary to accomplish a legitimate business end and there are no alternative means available that have a less discriminatory impact.

a. A THREE STEP PROCESS, BORROWED FROM THE EMPLOYMENT FIELD, CAN BE USED TO ESTABLISH ILLEGAL DISCRIMINATION.

The proscription against discrimination by common carriers is well-settled by both the common law[36] and statutory law.[37] With regard to video dialtone, a service previously associated with redlining, (Section

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[36]. A public utility is obligated by the nature of its business to furnish a service or commodity to the general public which it has undertaken to serve, without arbitrary discrimination....Such duties arise form the public nature of a utility, an statues providing affirmatively therefore are merely declaratory of the common law.

Overman v. Southwestern Bell Tel. Co., 675 S.W.2d 419, 424 (Mo. App. 1984) (citing 73B C.J.S., Public Utilities Sec 8).

[37]. 47 U.S.C. § 202(a) states that it is unlawful for a common carrier to:

make any unjust or unreasonable discrimination in practices, classifications, regulation, facilities, or services for... communication services.. or to make or give any undue or unreasonable preference or advantage to any particular persons, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

II,A,3, supra), the FCC has said that "encouraging universal service is an implicit goal" under Section 1 of the Communications Act of 1934.[38]

Borrowing from the procedural framework that has been well-developed in the employment field, the first part of a three step process involves a prima facie showing that a discrete class of subscribers has been unreasonably affected by a business practice. For example, a complaint must provide evidence that a common carrier's deployment schedule will deliver service to affluent and/or non-minority communities in advance of communities with high concentrations of minorities and/or low income people.

The Communications Act, as presently written, does not set forth protected classes (i.e., race, gender, income etc.). Instead, it prohibits "unreasonable discrimination" and "unreasonable preference or advantage to any particular person, class of persons, or locality..." 47 U.S.C. § 202(a). Unreasonable in the context of the example given means exposure to a discriminatory practice that is disproportionate in comparison with non-members of a class.[39] For example, a complaint must show that minority and non-minority communities are disproportionately represented in the proposed service area.

Once a prima face case of unreasonable discrimination has been established, a carrier is entitled to justify its actions by showing that the challenged practice has a necessary relationship to a

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[38]. Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, 5906 (1992), appeals pending sub nom. Makato Citizens Telephone Co. v. FCC, Nos. 92-1404, et al. (D.C. Cir. Sept. 9, 1992).

[39]. Griggs at 430.

legitimate business objective. For example, a carrier may argue that a challenged deployment schedule is the only way to maintain a competitive business operation.

In the employment field it is insufficient to merely show that a challenged practice is an *effective* means to a legitimate end; the means relied upon must rise to the level of a *business necessity*.[40] Under the *business necessity* doctrine, the argument that an alternative means is more expensive is impermissible, unless the expense is so great as to render the alternative practice infeasible.[41] The defense of a business inconvenience or annoyance is likewise unacceptable.[42]

The last step in the three-step process is the rebuttal to the carrier's business "justification". In order to prevail the rebuttal must show that less discriminatory means are available to accomplish the same ends relied upon in the carrier's defense. In the example involving a deployment schedule, challengers must establish that the carrier's goal of competitiveness can be accomplished by means of an alternative deployment plan that has less discriminatory impact.

The three steps outlined above can be either adopted as an administrative remedy by the FCC or relied upon by the courts in interpreting an anti-redlining statute that is silent on burdens of proof.

b. A STATUTORY SAFEGUARD AGAINST ELECTRONIC REDLINING SHOULD

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[40]. Griggs at 431.

[41]. Robinson v. Lorillard Corp., 444 F.2d 791, 799 n.8 (4th Cir.) cert. dismissed, 404 U.S. 1006 (1971).

[42]. Johnson v. Pike Corp. of America, 332 F. Supp. 490, 495 (C.D. Cal. 1971).

INCLUDE AN EFFECTS TEST AND A DISCLOSURE REQUIREMENT.

As the 104th Congress begins to deliberate universal service standards, the need for an effective anti-redlining provision should not be overlooked. From the above discussion it is evident that precedent for an "effects test" can be found in other anti- discrimination statutes. In the absence of such a standard communities that are the victims of redlining run the risk of having to prove discriminatory intent - a hurdle that will be difficult if not impossible to overcome.

Exhibit V contains proposed statutory language that includes both an effects test and a disclosure requirement. Paragraph (a) contains a general prohibition against the deployment of, or the refusal to offer access to, telecommunication services on the basis of race, national origin, income, or rural location. It specifically states that a business practice cannot be carried out with either the "purpose or effect" of having a discriminatory impact. The proscription against discrimination applies to deployment schedules that disadvantage members of the protected class over non-members. The prohibition only applies to telecommunications carriers with market power and therefore exempts competitors that have insignificant marketplace presence.

Subparagraph (b) requires carriers to submit deployment plans and periodic reports demonstrating compliance with the anti-redlining prohibition as a condition of receiving authorization to offer telecommunication services. The disclosure requirement permits the Commission to specify the kind of statistical data to be included in plans and periodic reports in order to evaluate compliance. The data must be in a census-tract format and available for public inspection and

review. This provision seeks to facilitate an objective analysis of the demographics associated with a proposed service area. Typical applications submitted under Section 214 are vague in their description of the proposed service area. Wire center designations are customarily used by some carriers to describe their proposed service area. Such geographical units that are difficult to match-up with demographic census data.

In order to protect carriers from unfair access to proprietary information by competitors, the Commission is instructed to devise appropriate safeguard measures.

The rulemaking provisions of subsection (c) require the Commission to annually certify compliance with the anti-redlining prohibition of subsection (a). The compliance standard contains a dual requirement: 1) that service be made promptly available to members of the protected classes identified in subsection (a); and 2) that service be made available to the protected classes at the lowest possible cost. This provision is intended to ensure the adoption of the "best means" that accomplish equitable deployment without total disregard for cost. The reasonableness of a service proposal is to be determined whether members of the protected classes are proportionately represented at each stage of deployment.

The Commission's regulations are required to comply with the doctrines of "business necessity" and "alternative means" under the Griggs standard such that the three-step process described in Section II,3,A will apply.

The compliance burden of the disclosure requirement is minimal.

The information requested - race and income according to census tract - is readily available. In the mortgage lending area, where the requirements are more rigorous, the Office of Management and Budget concluded that compared to other consumer compliance regulations CRA requirements are on average the least burdensome. Banks surveyed were estimated to spend about six hours a year complying with the law.[43] Routine market research conducted by telecommunication carriers enables them to collect demographic data on communities that they propose to serve. It is a very simple matter to disclose that information in a service authorization proposal.

III. POLICIES FAVORING OPEN ACCESS SHOULD ENCOURAGE PARTICIPATION BY SMALL AND MINORITY-OWNED BUSINESSES.

The Administration's vision of open access seeks to promote "competition among information providers and service options for consumers." NOI para. 58. OC/UCC supports these goals and urges the Department of Commerce to pursue them by funding demonstration projects that encourage participation by small and minority-owned businesses.

Recently, the Department, through the National Institute of Standards and Technology, contributed to a $6 million grant to CommerceNet. CommerceNet is a service designed to facilitate sales, solicitations, and bids for orders over the Internet. Buyers and sellers are brought together by means of multi-media catalogues, special directories, brokers and referral services.

While the goals of CommerceNet are laudable, it poses a number of shortcomings in terms of open access.

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[43]. Fishbein at 306.

First, only large organizations or technologically elite businesses have the necessary resources (staff and technical) to recognize the benefits of electronic commerce. Indeed, the Stanford Center for Information Technology, which focuses on the needs of the Silicon Valley region, is responsible for the development and deployment of CommerceNet. At this point CommerceNet does not have an outreach program designed to address the unique needs of small and minority-owned businesses.

Secondly, the financial costs of full CommerceNet membership discourage small business participation. Internet connection costs range from $4,000 to $14,000 just for set-up. Monthly charges for creation of a World Wide Home Page (suggested by CommerceNet) and additional services are $200 to $1,200 per month. Membership fees for a listing in the catalog start at $1,200.

Technological barriers present an even more formidable barrier to participation. According to CommerceNet literature,

> Because of the expected high graphics content of CommerceNet information, 14.4K access to CommerceNet information may be quite slow. While character-only CommerceNet information and tools are available, to receive the full (graphic) value of Commercenet and CommerceNet member storefronts, a minimum connection of 28.8K is recommenced.

Information providers over CommerceNet are recommended to have a "medium speed" connection of 56kbaud to 128kbaud.

While OC/UCC is quite aware of the need for corporate America to remain on the cutting edge of technology, it questions the public funding of projects that benefit financially advantaged businesses that have the resources to achieve this objective independently. Secondly, OC/UCC finds no justification for the funding of any program that does